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Supreme Court of the United States

OCTOBER 1955 TERM

WILLIAM GIGLIO and FRANK LIVORSI,
Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER 1955 TERM

WILLIAM GIGLIO and FRANK LIVORSI,
Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioners respectfully ask this court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed the conviction of petitioner William Giglio, with respect to eight counts of a ten-count indictment, and of petitioner Frank Livorsi, with respect to four counts of the same indictment, charging violations of § 145(b) and § 3793(b)(1) of the 1939 Internal Revenue Code and § 2 of Title 18, U. S. C.

THE OPINION BELOW

The opinion of the court below has not yet been officially reported. A copy is annexed hereto (see pp. 32 to 42, *infra*).

STATEMENT OF GROUNDS OF JURISDICTION

The judgment of the Court of Appeals was rendered and entered on April 20, 1956. Timely application for rehearing

was made on May 4, 1956, and was denied on May 10, 1956. On application of the petitioners, the Court of Appeals stayed its mandate on May 21, 1956. The jurisdiction of this court is invoked pursuant to Title 28, U. S. C., § 1254, and Title 18, U. S. C., Rule 37.

QUESTIONS PRESENTED FOR REVIEW

As to Petitioners Giglio and Livorsi:

1. Where six indictments are dismissed by the district court because of the violation of defendants' constitutional privilege against self-incrimination before the grand jury and a superseding indictment containing identical counts is found by another grand jury, may the defendants be deprived of all opportunity to ascertain whether the superseding indictment was predicated upon tainted evidence?

2. Upon the trial of the superseding indictment, may the defendants be deprived of an opportunity to ascertain whether tainted evidence, or leads and clues therefrom, have been employed against them?

3. Where the government has obtained and used evidence in violation of the defendants' constitutional privilege against self-incrimination, upon whom does the burden rest of demonstrating that the government's evidence at the trial did or did not have an independent origin?

As to Petitioner Livorsi:

4. May a defendant be convicted of wilfully attempting to defeat and evade his tax by filing a false return, under § 145(b) of the Internal Revenue Code, now § 7201 of the 1954 Code, in the absence of a tax deficiency although the government claims that fraudulent omissions exist in the return?

5. May a defendant be convicted of an attempt to defeat and evade the tax by concealment of assets where the

alleged concealment takes place outside the territorial jurisdiction of the district court in which the case is tried?

6. Does the government establish jurisdiction of the offense of attempting to defeat and evade the tax by concealment of assets merely by proving that the defendant concealed his tax liability in the jurisdiction in which the case is tried?

7. Does proof of the mere withdrawal of moneys from a corporation by an employee establish the crime of attempting to defeat and evade the corporation's tax by misappropriating, converting and diverting corporate assets?

CONSTITUTIONAL AND STATUTORY PROVISIONS RELIED UPON

The provisions of the Constitution of the United States, insofar as applicable to this case, and the statutes relied upon, are as follows:

> "No person * * * shall be compelled in any criminal case to be a witness against himself * * *." (Fifth Amendment)
>
> "In all criminal prosecutions the accused shall enjoy the right to a * * * trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor * * *." (Sixth Amendment)

Section 145(b) of the 1939 Internal Revenue Code (now § 7201 of the 1954 Code with immaterial variations):

> "* * * any person * * * who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony

and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Section 182 of the 1939 Internal Revenue Code (now § 702 of the 1954 Code)*:

> "In computing the net income of each partner, he shall include, whether or not distribution is made to him—
>
> (a) * * *
>
> (b) * * *
>
> (c) His distributive share of the ordinary net income or the ordinary net loss of the partnership * * *."

STATEMENT OF THE CASE

1. In 1950, three informations were filed in the United States District Court for the Southern District of New York charging the petitioners Giglio and Livorsi, along with Lawn and Roth, as defendants, with offenses under the 1939 Internal Revenue Code in connection with individual and corporate tax returns for the year 1946 (51a-53a).**

2. The informations were never brought to trial. Instead, the government continued to investigate the tax affairs of the defendants. In 1952, in the midst of that investigation, the defendants were subpoenaed before a grand jury sitting in the Southern District of New York,

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*The Senate Committee Report (83d Cong., 2d Sess., S. Rep. No. 1622 [1954] 376) notes that § 702 of the 1954 Code, although somewhat different in terminology, "represents no change in current law and practice."

**Numbers in parentheses, unless otherwise indicated, refer to pages of petitioners' appendix in the court below. Numbers followed by the letter "a" refer to pages of an appendix filed by the government in the court below in an appeal entitled, *"United States* v. *Roth,* et al.," 208 F. 2d 467. The government's appendix in the court below on the present appeal is referred to as "Gov. App."

in a proceeding designated "Re: John Doe," and ordered to produce a vast quantity of books and records, including those of four partnerships conducted by Giglio and Livorsi (54a-59a). After the appearance of the defendants and the production of their papers, the grand jury in 1952 found six indictments against them, consisting in all of ten counts, charging violations of the Internal Revenue Code in connection with their individual, partnership and corporate tax returns for the year 1946, the concealment of assets in 1947 and conspiracy to commit such alleged offenses (37a-50a).

3. Upon motion of the defendants, Judge Henry W. Goddard dismissed the 1952 indictments (*United States* v. *Lawn,* 115 F. Supp. 674).* He found that the indictments, which substituted felony charges for the misdemeanors alleged in the 1950 informations, were predicated on tainted evidence obtained in violation of the defendants' constitutional privilege against self-incrimination. Judge Goddard expressly held that "the evidence obtained on the examinations of the defendants at least furnished a link in the chain of evidence needed to convict them for the crimes charged. In Giglio's case, it was procured after he had pleaded his privilege. The constitutional rights of the defendants were thus clearly violated" (id., at p. 678).

4. The prosecutor had compelled individuals, who at the time actually were defendants in a pending criminal case (not mere witnesses or mere prospective defendants), to testify before a grand jury which was conducting a continuing investigation of the very subject matter of the then pending criminal charges. The petitioner Giglio was compelled to testify despite his repeated claim of the privilege against self-incrimination (91a-96a). Under threat of contempt proceedings (99a-101a; 114a-115a), he was

*The government's appeal from this order was dismissed as not timely. *United States* v. *Roth,* 208 F. 2d 467.

compelled to produce at least eighty cartons of partnership and personal papers before the grand jury, also in plain violation of his privilege against self-incrimination. In addition to dismissing the six indictments, Judge Goddard directed the government to return to the defendants the partnership and personal records produced by them in response to the grand jury subpoenas.

5. In the court below, the government conceded (Br. G. p. 73) that "there *was* some significant information in the partnership papers produced by appellants which may have led the 1952 grand jury to indict." (Emphasis in original.) Thus, the government admitted, in effect, that the 1952 indictments were procured, in part, by the use of tainted evidence obtained by the invasion of the defendants' constitutional privilege against self-incrimination.

6. Subsequently, and in 1953, the present indictment was found by a grand jury in the Southern District of New York. The present indictment (10-21), which was found before the defendants' papers were returned to them pursuant to Judge Goddard's order (39), is identical with the dismissed 1952 indictments (37a-50a) with the exception of minor allegations and recomputations. The prosecutor freely admitted "the deadly parallel" (1949).

7. The defendants made a timely motion in the district court to dismiss the present indictment (26) and, in connection with that motion, requested a hearing at which the court could determine whether or not the government had employed any of the tainted evidence, or leads and clues obtained therefrom, in obtaining the present indictment. That motion was denied by Judge Edmund L. Palmieri (179; *United States* v. *Giglio*, 16 F. R. D. 268) solely on the basis of conclusory allegations contained in affidavits submitted by government agents to the effect that tainted evidence was not so used (182). That phase of the defendants' pre-

trial motion which sought suppression of the use of leads and clues, obtained by the government from the production of the defendants' books and records and oral testimony before the grand jury in violation of their constitutional rights under the Fifth Amendment (26), in effect, was referred to the trial court (183).

8. The trial court refused to permit the defendants to establish, either before the jury or at a separate hearing, (a) whether tainted evidence had been employed *to procure the indictment*, or (b) whether tainted evidence, or leads and clues therefrom, was employed *at the trial* by the government.

The trial judge's reason for so ruling was that he was bound by Judge Palmieri's decision (2085) and that if the matter were presented to him *de novo* he would rule the same way on the basis of affidavits of government agents (Govt. App. 100a-110) denying the use of tainted evidence or leads and clues therefrom (247-8). The Court of Appeals affirmed.

JURISDICTION OF THE COURTS BELOW

The district court had jurisdiction under § 145(b) and § 3793(b)(1) of the 1939 Internal Revenue Code and § 2 of Title 18 U. S. C. The Court of Appeals had jurisdiction under Title 28 U. S. C., § 1291.

REASONS RELIED ON

(A) As to Petitioners Giglio and Livorsi

Questions 1, 2 and 3

I.

The Court of Appeals held that it rested in the sound discretion of the district court to refuse the petitioners a hearing; that the mere fact that Judge Goddard dismissed

the 1952 indictments because of the use of allegedly illegal evidence did not entitle the defendants to a hearing as a matter of law; that this was particularly so in the face of "the strong adverse showing made by the affidavits of the prosecution." The cases cited by the Court of Appeals in support of these propositions, namely *Nardone* v. *United States*, 308 U. S. 338; *Goldstein* v. *United States*, 316 U. S. 114, affirming *United States* v. *Goldstein*, 2 Cir., 120 F. 2d 485; and *Lapides* v. *United States*, 2 Cir., 215 F. 2d 253, all actually support the petitioners' position. See also: *United States* v. *Coplon*, 2 Cir., 185 F. 2d 629.

Judge Learned Hand in *United States* v. *Goldstein*, 120 F. 2d 485 (at p. 488) interpreted the holding of this court in *Nardone* to mean that, where the government has made some use of illegally obtained evidence, thereafter it has the burden of demonstrating that its other evidence had an independent origin.* In its opinion in the instant case, the Court of Appeals expressly placed upon the petitioners the burden of proof which the same court, in *Goldstein* and in *Coplon*, had imposed upon the government.

The reversal in *Coplon* (*supra*) turned, in part, on the precise issue of where the burden of proof rests when the defendant establishes that the prosecution has "tapped" his wires. Judge Learned Hand held that, when the invasion of defendant's rights is established, "the burden falls upon the prosecution to prove that the information so gained has not 'led', directly or indirectly, to the discovery of any of the evidence which it introduces" (185 F. 2d, at p. 636). Judge Hand observed that the Second Circuit Court of Appeals would adhere to this principle "until we are told that it is wrong" (id.). This court has never spoken directly on the

*In affirming *Goldstein* (316 U. S. 114), this court did not pass upon the question.

issue. It has neither approved nor disapproved of the *Coplon* holding. Yet, the Court of Appeals applied this principle in a case which involved our national security, where a mere statute forbidding interception and divulgence of telephone communications had been violated, and has now abandoned the doctrine, without being "told that it is wrong," in an income tax prosecution where a flagrant invasion of the defendants' constitutional rights has taken place. The court below presents us with this paradox, without mentioning its decision in *Coplon*, while it insists that it is following its own pronouncements and the precedents in this court.

In *Coplon* v. *United States*, 191 F. 2d 749,* the Court of Appeals for the District of Columbia Circuit reversed a judgment of conviction because of the refusal of the trial court to afford the defendant a hearing on the question of whether her right to the assistance of counsel under the Sixth Amendment had been violated. The Court of Appeals held (at p. 760) that the "appellant's allegations that the government listened through a wiretapping device to her telephone conversations with her attorney before the trial and while it was going on" entitled her to a hearing and that the district court had erred in not affording her one.

Thus, the decision here represents not only a conflict with *Goldstein* and *Coplon* in the same circuit, but also a conflict with the *Coplon* case decided in the District of Columbia Circuit.

II.

There are compelling reasons for requiring the government to assume the burden of proving the independent source of its evidence once the taint has been established. As the court below pointed out in *Goldstein* (120 F. 2d, at p. 488), the wrongdoer who mingles the consequences of

*The defendant was the same as in *United States* v. *Coplon*, 185 F. 2d 629 in the Second Circuit.

lawful and unlawful conduct should disentangle them and must bear the prejudice of its failure to do so; it is unfair to throw upon the innocent party the duty of unravelling the skein which the guilty party has snarled; to impose that duty upon the prosecution is particularly appropriate for it necessarily has full knowledge of just how its case has been prepared; all possible doubts must be resolved against the wrongdoer.

These have long been regarded, in the Second Circuit, as practical considerations (*United States* v. *Bonanzi*, 2 Cir., 94 F. 2d 570, 572) and they have proven sound in actual practice. For example, in *United States* v. *Lipshitz*, 117 F. Supp. 466 (E. D. N. Y., 1954), a defendant indicted for tax evasion moved to suppress evidence on the ground that the revenue agent, who called on what purported to be a routine investigation, was really acting with a view to criminal prosecution. The government submitted affidavits in opposition denying that any information obtained by the agents resulted in evidence establishing the criminal liability charged in the indictment. If the mere affidavits of government agents are deemed sufficient to deprive a defendant of an opportunity to demonstrate the use of tainted evidence, the matter would have ended there. However, the district court refused to resolve the issue on affidavits and ordered a hearing, after which the motion to suppress was granted (132 F. Supp. 519 [E. D. N. Y., 1955]).

Two further instances of the soundness of the *Goldstein* rule are provided by the present case:

(a) The defendants' motion before Judge Goddard to dismiss the 1952 indictments was opposed by a sworn statement of the then prosecutor in which he categorically denied "any and every allegation that might be contained in the respective affidavits of the individual defendants concerning my examination of them before the grand jury even sug-

gesting any impropriety on my part" (underscoring in original), and maintained that the "proceedings were as a matter of law entirely proper and within the provisions of the Fifth Amendment of the United States Constitution" (Aff. Leone, 1-15-53, p. 2, Rec. on Appeal, *United States* v. *Roth*). In a brief submitted to Judge Goddard, the prosecutor stated (at pp. 4-5) "as categorically denied in the affidavit of Gerome J. Leone, submitted to this court, nothing improper took place before the grand jury * * *."

According to the doctrine now enunciated by the Court of Appeals, these categorical statements by a government attorney should have precluded further inquiry. Judge Goddard, nevertheless, refused to accept the affidavit of a government agent as binding upon him, held a hearing at which the grand jury minutes were made available to the defendants and then dismissed the indictments because of the violations revealed by the minutes although categorically denied by the prosecutor.

(b) After he had pleaded his privilege against self-incrimination before the grand jury, Giglio was forced to admit the sale of his home in Locust, N. J. (110a), a transaction which became the basis for the substantive count in the 1952 indictment charging that he concealed his assets (41a) and the basis for that part of the conspiracy count which charged the same offense (45a). These charges were subsequently repeated verbatim in the superseding indictment (15, 18), were the subject of extensive testimony at the trial (954-60, 1220-32) and finally were commented upon in the prosecutor's summation (2646). The independent source of the evidence used at the trial was never established. On appeal, the government made an "offer of proof" (Br. G. p. 64, see text and footnote) concerning the source of this evidence as well as the source of items of evidence challenged by the defendant Lawn. This belated "offer of proof" in the Court of Appeals

emphatically underscores the necessity for the hearing which the defendants were denied in the district court.

III.

The proposition enunciated by the Court of Appeals in the instant case that conclusory affidavits, submitted by government agents, to the effect that they had not used tainted evidence before the grand jury, or at the trial, were sufficient to deprive the petitioners of a hearing and of the right to examine the witnesses, runs counter to decisions both of this court and of the Court of Appeals itself. See *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260; *United States* v. *Hayman*, 342 U. S. 205, 223; *United States* v. *Pisciotta*, 2 Cir., 199 F. 2d 603; *Lapides* v. *United States*, 2 Cir., 215 F. 2d 253. In *Accardi*, this court ordered a hearing despite a finding by the Court of Appeals of the Second Circuit that the moving papers asserted a mere "suspicion and belief" regarding the alleged wrongful conduct of the government (347 U. S., at p. 265). Here the petitioners have demonstrated not a mere "suspicion and belief," but an actual violation of their constitutional privilege against self-incrimination and an actual use by the government of the tainted evidence procured thereby.

Petitioners have fully established the invasion of their constitutional rights, and the use of the evidence so obtained, which should place the burden upon the government of demonstrating the independent origin of its evidence. Such a burden is not discharged by ex parte affidavits of the very agents who were responsible in the first instance for the violation of the petitioners' rights.

IV.

The opinion of the court below asserts that the government's affidavits set forth "the sources of the evidence used in obtaining the 1953 indictment" and demonstrate "that it was not based upon the alleged illegally obtained mate-

rial." The government submitted no such affidavits. An affidavit by Theodore Present (83), the revenue agent in charge of the tax audit and computation (83), merely listed certain "categories of documents" which the government claimed that it had prior to the 1952 indictment (84). Aside from a general reference to certain bank records, the documents in these so-called categories were not described. Present referred to books and records obtained from third persons, those allegedly abandoned by defendants and those obtained from a receiver in the State of New Jersey, without further description (84). No one stated whether or not any of these documents were ever used before the grand jury. Indeed, on the present record, the only ascertainable fact is that tainted evidence did enter into the finding of the 1952 indictments. Whether the government employed anything but tainted evidence does not appear.

Similarly, the affidavit of James J. Twohig, the special agent in charge of the prosecution (93), merely alleges that by the end of 1950, the government had collected "a mass of documents" from various sources (95). His affidavit affords no further description and does not designate what was used before the grand jury. Indeed, there was a studied failure on the part of the government agents either to describe what their untainted evidence was or to assert, even in conclusory terms, that it was employed before the grand jury.

V.

The decision of this court in *Costello* v. *United States*, 350 U. S. 359, did not sanction the use of tainted evidence to procure an indictment, nor did it sanction the procurement of an indictment by such means followed by a refusal to permit the aggrieved defendant to ascertain whether his constitutional rights had been violated.

Even if that decision sanctions the use of tainted evidence to indict, we cannot believe that this court has approved either the use of tainted evidence at a trial or the

erection of an impenetrable barrier to prevent the defendant from discovering such use. The refusal by the district court to permit the defendants, during the trial, to ascertain from the only witnesses who had knowledge of the vital facts whether the government was using tainted evidence, or evidence obtained by virtue of leads and clues derived therefrom, constituted error in an important area of federal criminal prosecution.

In affirming, the Court of Appeals said:

> "* * * it is clear that appellants had a right of full cross-examination during the trial as to the sources of Government exhibits and that they exercised this right on a number of occasions."

This statement is refuted by the record. The petitioners were accorded the right of cross-examination only with respect to certain third parties, namely, vendors of merchandise to one of the business entities involved, who were called in connection with a very limited phase of the government's case* and who obviously had no knowledge as to how they came to the attention of government agents (1631-2, 1648-51, 1657-8, 1662). When, on the other hand, the defendants attempted to examine the only witnesses who had knowledge of the vital facts, namely, Roth, Present and Leone, they were promptly and sharply foreclosed by the trial court. Roth had pleaded guilty to the 1953 indictment and appeared as a witness in behalf of the government at the trial (981).

Roth, Present and Leone, were the key witnesses on this issue. They were thoroughly familiar with all of the defendants' books and records, including the tainted evidence produced before the 1952 grand jury. Roth had kept these books and records in the course of his employment

*These witnesses were called in connection with the government's claim that one of the partnerships had omitted a closing inventory from its information return (23).

by the defendants' business entities (984-5, 1096). Present, in behalf of the government, took charge of the eighty cartons of documents which the defendants were illegally compelled to produce (84-5). He inventoried the papers, then analyzed and audited them (86). Leone presented the case to the 1952 grand jury and, after the indictments had been dismissed, assisted in presenting the case to the 1953 grand jury which found the present indictment (102-3). The examination of these three witnesses, two called by the government and one proffered by petitioners, presented the only opportunity which petitioners had, at the trial, to ascertain whether the government was using leads and clues obtained from the tainted evidence. The trial court, in each instance, flatly forbade such an examination.

Thus, when petitioners' counsel sought to examine Roth about "leads and clues that the Government might have used while they illegally had our partnership books" (1344), the court held that "in the absence of any further foundation, I am not going to go off into the use of these records" either before the jury or at a separate hearing out of the presence of the jury (1356). When petitioners' counsel sought to cross-examine Present, the government's accountant, with respect to the use of tainted evidence or leads and clues obtained therefrom at the trial, the court ruled (1945):

> "No, Judge Palmieri said there wasn't enough foundation to start laying one * * * and I think that is about the way I feel about it. I am not going into the subject on the basis of what we have had so far."

After the government rested, the defendants called Leone who had presented the case to both the 1952 and 1953 grand juries and at whose direction the tainted evidence originally had been produced by the defendants. The court ruled out all questions directed to this witness concerning the use of tainted evidence, or leads and clues obtained therefrom (2136).

The record is quite clear that petitioners did not have "a right of full cross-examination during the trial as to the sources of government exhibits * * *," as the Court of Appeals held. Indeed, they were flatly denied any examination, on the issue of leads and clues, of the only witnesses through whom they could have established the vital facts.

The petitioners were deprived of their right under the Sixth Amendment to be confronted with the witnesses against them on the important issue of whether tainted evidence, or leads and clues therefrom, was being used at the trial. Cf. *United States* v. *Coplon*, 2 Cir., 185 F. 2d 629, 637-8.

VI.

In view of the trial court's refusal to permit inquiry concerning the source of the evidence used against the petitioners, it is difficult to understand the basis for the conclusion announced by the Court of Appeals that the 1953 indictment may have been based "exclusively upon the massive evidence not so tainted."

The source and nature of the evidence which went into the finding of the 1953 indictment and the source of much of the evidence which the government produced at the trial are matters of pure speculation on this record. The Court of Appeals indulged in pure speculation when it referred to the "massive evidence not so tainted," which may have been used in connection with the present indictment and, by inference, at the trial.

The Court of Appeals referred to the hearings before the Kefauver Committee as a source of evidence "not so tainted." The very fact that this matter was presented, in 1950, not to a grand jury but to the Kefauver Committee, suggests that the government did not have enough evidence to indict or to proceed to trial. The very fact that these hearings were followed by the 1950 informations, which

were never brought to trial, emphasizes the fact that even this inquisition did not produce sufficient evidence for that purpose.

The Court of Appeals also referred to "the investigation and development of evidence" which "continued after that time." Whether the government's proof stemmed from independent sources, or from the violation of the defendants' privilege against self-incrimination cannot be decided by a general reference to an "investigation and development of evidence." It was during that very "investigation and development of evidence" that the defendants were compelled to testify against themselves and to produce their partnership records in violation of their privilege against self-incrimination. It is of the utmost significance that the defendants were not indicted until after these illegal proceedings had taken place.

The government has never explained its reason for calling the defendants before the 1952 grand jury. In the absence of such an explanation, it must be concluded that the defendants were called and their papers seized because, without the violation of the Fifth Amendment, the prosecution did not have enough evidence to indict or to convict.

VII.

In Communist Party v. *Subversive Activities Control Board*, U. S. , 100 L. ed. (Advance p. 554), this court pointed out that when the finding of an administrative body is the product, in part, of perjurious witnesses, "it does not remove the taint for a reviewing court to find that there is ample innocent testimony" to support it.

Similarly, it does not remove the taint here for the court below to speculate concerning the "massive evidence not so tainted" which the government was supposed to possess. As Judge Hand made so clear in *Goldstein* and *Coplon*, once a defendant establishes that the government has obtained

and used tainted evidence, fact can supplant speculation only by affording the defendant an opportunity to cross-examine government witnesses who assert that leads and clues have not been employed at the trial.

VIII.

No conviction should be permitted to rest upon the use of tainted evidence. No prison sentence, particularly one of fifteen years, can be justified where the suppression of tainted evidence rests upon pure speculation. As Judge Learned Hand said in *United States* v. *Coplon*, 185 F. 2d 620 (at p. 638), with respect to what may have considered a "flimsy grievance," not the substantial violation of constitutional rights presented here:

> "In the case at bar it may seem to have been a flimsy grievance to deny to Judith Coplon the opportunity to argue that these records did 'lead,' or might have 'led,' to her conviction; in truth it is extremely unlikely that she suffered the slightest handicap from the judge's refusal. But we cannot dispense with constitutional privileges because in a specific instance they may not in fact serve to protect any valid interest of their possessor. Back of this particular privilege lies a long chapter in the history of Anglo-American institutions. Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens."

(B) As to Petitioner Livorsi

Livorsi was named in four counts of the indictment. He was charged (14-21) with an attempt to defeat and evade his personal tax for the year 1946 by filing a false return (Count 6), with an attempt to defeat and evade payment of his tax for the year 1946 by concealing his assets

(Count 8), with an attempt to defeat and evade payment of the tax of American Brands Corporation by misappropriating, converting and diverting assets (Count 9) and with participating in a conspiracy (Count 10).

Livorsi was convicted on all of these counts. The court sentenced him to a term of imprisonment of fifteen years. Five years of that term are based on Count 6 (evasion of personal taxes) and Count 8 (concealment of his personal assets), the sentence on these two counts running concurrently.* Another five years of his term of imprisonment are based upon Count 9 (diversion of assets of American Brands Corporation) and the final five years of his term of imprisonment are based upon Count 10 (conspiracy).

Livorsi's conviction on Count 6 raises the important question of whether the felony of evading taxes by filing a false return may be established under § 145(b) of the 1939 Internal Revenue Code (now § 7201 of the 1954 Code) without proof of a tax deficiency. His conviction on Count 8 raises an important question of constitutional law relating to the venue for prosecuting the offense of tax evasion by concealment, while the conviction on both Counts 8 and 9 raises important questions relating to the never previously defined elements of that offense. These are all issues of importance to the administration of justice in the federal courts which have never been settled, or even discussed, by this court. The government failed to establish that Livorsi participated in a conspiracy (Count 10). Since his conviction on that count raises no issue of public importance, beyond the frequently noted abuse of the conspiracy count in federal criminal prosecutions, we are hopeful that, if this court grants certiorari with respect to

*Even if the conviction on Count 8 alone is reversed, Livorsi will be in a position to avail himself of the possibility of reducing his sentence under Count 6 suggested by the recent decision of this court in *Berra* v. *United States*, U. S. , 100 L ed (Advance p. 563).

the other issues, which have an importance far beyond the particular facts and parties involved, it will review also the conviction on the conspiracy count since a five year term of imprisonment has been predicated thereon.

Question 4

Livorsi was charged with an attempt to defeat and evade his personal income tax for the year 1946, by filing a false income tax return (Count 6). The conviction on this count raises the question of whether, in a prosecution for filing a false return under § 145(b) of the 1939 Internal Revenue Code (now § 7201 of the 1954 Code), the government must prove an actual tax deficiency in addition to a wilful attempt to defeat and evade.

1. Whether or not there was a tax deficiency in Livorsi's 1946 tax return depended upon the amount of income he was required to report from two partnerships, one known as Eatsum Food Products Co., Ltd. and the other Tavern Fruit Juice Co. That issue, in turn, depended wholly upon the duty of a partner to report his distributive share of partnership income. Section 182 of the 1939 Code, entitled "Tax of Partners," required that in "computing the net income of each partner, he shall include whether or not distribution is made to him * * * his distributive share of the ordinary net income" of the partnership.

2. The most bitterly contested single issue in this case revolved about the mandate of this statute. The government's theory at the trial was that the defendants Livorsi and Giglio, because of an agreement made with one Lubben, a 50% partner, after profits had been earned, were required to reallocate their respective distributive shares of profits for tax purposes (1871-2). The defendants maintained that both they and Lubben were required to report not the income allegedly distributed, but an amount equal to their

respective distributive shares of partnership profits. The Court of Appeals summarized the dispute as follows:

> "In this regard the contention of the government was in essence that the distributive share of the Giglio-Livorsi group had been increased from its original 50 per cent by reason of Lubben's agreement of March, 1946, to accept $117,000 in lieu of his original share, and that, therefore, the 1946 personal returns of Giglio and Livorsi correspondingly understated their income. Appellants on the other hand argued that Lubben was charged with the full 50 per cent fixed by the original partnership agreement, and that the taxable share of the Giglio-Livorsi group could not therefore exceed 50 per cent."

3. The defendants' position was fully supported by well settled authority. See *Commissioner* v. *Goldberger's Estate*, 3 Cir., 213 F. 2d 78; *Stoumen* v. *Commissioner of Internal Revenue*, 3 Cir., 208 F. 2d 903; *Ruprecht* v. *Commissioner of Internal Revenue*, 2 Cir., 39 F. 2d 458; and *In the Matter of Bell*, 5 Cir., 219 F. 2d 442.

4. The district court in its charge, "because of the complication of law as to distributive shares" (2731), instructed the jury to "disregard any income" the defendants "may have received from Eatsum" in considering Count 5 (relating to Giglio's personal return) and Count 6 (relating to Livorsi's personal return) (2731). The court repeated, "* * * because of that distributive share difficulty, don't consider Eatsum at all, their income from Eatsum at all in connection with counts 5 and 6" (2731). This instruction was delivered at the specific request of the prosecutor who had stated (2730): "We want to eliminate all income from Eatsum on counts 5 and 6."

5. An examination of a chart introduced by the prosecution (Ex. 151) demonstrates exactly what the prosecutor and the court accomplished by having the jury disregard

"any income" the defendants "may have received from Eatsum." According to Exhibit 151, Livorsi's income from Eatsum was $228,288.58. By withdrawing from the jury's consideration "any income * * * received from Eatsum," the court eliminated income in the amount of $228,288.58 which the government had attributed to Livorsi and which, it contended, he should have reported on his personal income tax return for the year 1946. Since the government claimed that Livorsi had understated his net income from all sources to the extent of approximately $138,000 (1904), after charging Livorsi with income of $228,288.58 from Eatsum, and after all adjustments in favor of the government, there obviously could be no tax deficiency for this period once the Eatsum income was eliminated. In the Court of Appeals, the government conceded, as, indeed, it was compelled to do, that the elimination of Eatsum income would result in an overstatement of Livorsi's income on his personal tax return for 1946 "even if Tavern or other income was found to have been fraudulently understated" (Br. G. p. 95). The government contended, however, that the court, by its instruction, had not eliminated Eatsum income *entirely*. The government contended that the prosecutor's suggestion to the court, and the court's instruction to the jury, merely referred to the elimination of the alleged *"understatement* of Eatsum income" (Br. G. p. 95). The Court of Appeals adopted this argument, stating:

> "* * * the judge instructed the jury to disregard alleged understatement of income from Eatsum in considering the counts charging the falsification of individual returns. Since, however, there was evidence of understatement of income from sources other than Eatsum, the verdict on these counts must stand."

6. There is a vast difference between an instruction to the jury that it disregard "alleged understatement of income from Eatsum" and an instruction that it disregard "any

income from Eatsum." The difference is illustrated by the figures in this case. Exhibit 151 shows that the *income* from Eatsum attributed to Livorsi amounted to $228,288.58, while the alleged *understatement* of income from Eatsum on Livorsi's return amounted to $127,164.70 (the difference, of course, being accounted for by the fact that Livorsi reported $101,123.88 from this source). When the prosecutor told the judge that he desired to eliminate "anything with regard to Eatsum" insofar as the individual tax returns of the defendants were concerned (2722); when he repeated, "We want to eliminate all income from Eatsum on counts 5 and 6" (2730); when the court in its supplemental charge to the jury instructed them to "disregard any income they may have received from Eatsum in consideration of those counts," and added, "* * * don't consider Eatsum at all, their income from Eatsum at all in connection with counts 5 and 6" (2730-1), the jury had been told in the clearest and most unequivocal terms to disregard any and all income from Eatsum and not merely the alleged *understatement* of income attributed to the defendants.

7. The Court of Appeals, however, rendered this question unimportant by holding that, since "there was evidence of understatement of income from sources other than Eatsum, the verdict on these counts must stand." Thus, the court below enunciated the erroneous principle of law that a conviction for tax evasion by filing a false return under 145(b) could be sustained despite the government's failure to establish a tax deficiency. In almost every circuit, including the Second Circuit, the Courts of Appeals have ruled that the government must prove, in such a prosecution, not only a wilful attempt to defraud, but also an actual tax deficiency. See, for example, *Gleckman* v. *United States* 8 Cir., 80 F. 2d 394; *Tinkoff* v. *United States*, 7 Cir., 86 F. 2d 868; *United States* v. *Schenck*, 2 Cir., 126 F. 2d 702, 704; *Rose* v. *United States*, 10 Cir., 128 F. 2d

622, 626; *United States* v. *Rosenblum*, 7 Cir., 176 F. 2d 321, 329; *Elfmon* v. *United States*, 4 Cir., 209 F. 2d 642, 643; *Legatos* v. *United States*, 9 Cir., 222 F. 2d 678, 688. It has been suggested that, in the absence of proof of a deficiency, a taxpayer may be subjected to other criminal sanctions, such as those provided by § 3793 of the 1939 Internal Revenue Code which prohibits making false statements as to items of income or deductions (Balter, *Fraud Under Federal Tax Law*, 348-9 [2nd Ed., 1953]). The correct principle is summarized in Gilman, *Current Problems in Criminal Tax Fraud*, 33 Taxes 749, 752, (Oct., 1955), as follows:

> "* * * under the law as it is now, a deficiency must be proved in order to sustain the felony conviction under Section 7201."*

This issue has never been passed upon by this court.

8. We should not leave this subject without noting that the only testimony against Livorsi on this count was that Roth, the accountant, prepared the return (1248) and Livorsi signed it (1247). The taxpayer was convicted of wilfully attempting to defeat and evade his personal tax by omitting some of his distributive share of partnership net income from his individual return where the only evidence against him was that he signed a return which the accountant had prepared. Yet the determination of the true distributive shares of the partners posed so many difficulties that the prosecutor was forced to admit, after all of the evidence was in, the "complexity" of the problem (2728), and the court, in submitting the case to the jury, instructed them not to consider the income from one of the partnerships "because of that distributive share difficulty" (2731).

*Section 7201 of the 1954 Code is the successor to §145(b) of the 1939 Code with immaterial variations.

Questions 5 and 6

Livorsi was charged with an attempt to defeat and evade the payment of a large part of his tax for the year 1946, by concealing his assets "at the Southern District of New York and elsewhere" (Count 8). The government failed to prove the jurisdictional fact that any such concealment took place within the Southern District of New York.

1. Livorsi resided on Long Island in the Eastern District of New York (2065, 2652). All of the acts of alleged concealment testified to at the trial under Count 8 took place outside of the Southern District of New York (2057-65, 2066-9, 2070-3). The sale of his house (2067) which was located in New Jersey (950), the deposit of the purchase price in escrow (2059-60, 2067-8), the transfer of the cash to Livorsi (2070, 2072-3), all took place in the District of New Jersey, while the correspondence in connection with the transaction, if pertinent on this issue, went from New Jersey to Long Island in the Eastern District of New York (2065).

In the court below, the government admitted (Br. G. p. 34) that the "only personal *asset* belonging to Livorsi as to which there is direct and positive evidence of concealment by Livorsi * * * is his New Jersey estate."

2. It is no answer that Livorsi's tax return for 1946 was filed in the Southern District of New York. Livorsi's alleged attempt to defeat and evade his tax for 1946 by filing a false return is the subject of a separate count (Count 6). The filing of the return is not a necessary element of the attempt to defeat and evade payment by concealment of assets. In *Spies* v. *United States*, 317 U. S. 492, 499-500, this court held that a taxpayer who filed no return at all might be guilty of an attempt to evade under Section 145(b) of the 1939 Code if he concealed his assets with a tax evasion motive. Filing the return is, therefore,

not an element of the offense of concealment and the fact that the return was filed in the Southern District of New York has nothing whatever to do with an attempt to evade payment by concealment elsewhere.

3. In an attempt to supply the jurisdictional requirement, the government urged in the court below (Br. G. p. 34) that "part" of the concealment of *assets* in New Jersey consisted of Livorsi's concealment of *tax liability* elsewhere. The use of the word "part" in this context is ambiguous if not meaningless. The government carefully refrained from asserting that concealment of tax liability constitutes an essential element of the offense of concealing assets. Obviously, it does not, for a taxpayer may admit his full and correct tax liability yet still be guilty of concealing his assets. In a consideration of jurisdiction, the only significant factor is whether the government has established that an element of the offense of concealment took place in the Southern District of New York. The matters from which the government sought to infer a concealment of *tax liability* constituted, at most, mere preparation for that offense and cannot be deemed elements thereof. Even if acts of alleged preparation took place in the Southern District of New York; and there was no evidence here that they did, the district court there lacks jurisdiction of the offense of concealing assets committed in New Jersey (*Reass* v. *United States*, 4 Cir., 99 F. 2d 752, 755).

4. Questions of venue in criminal cases "are not merely matters of formal legal procedure. They raise deep issues of public policy * * *" *United States* v. *Johnson*, 323 U. S. 273, 276 (1944). The issue is fundamental, arising, as it does, under the Constitution. See Article III, Section 2, Clause 3 (relating to state courts) and the Sixth Amendment (relating to federal courts). *United States* v. *Johnson, supra*, at p. 275, *Haas* v. *Henkel*, 216 U. S. 462 (1910)

and *United States* v. *Borow*, 101 F. Supp. 211 (D. C. N. J., 1951). In the very recent cases of *Johnston* v. *United States* and *United States* v. *Patteson*, U. S. , 24 L. W. 4263, this court held that, while under the Sixth Amendment the venue of a trial is predetermined, nevertheless, the place of the crime "is determined by the acts of the accused that violate a statute." This court further held that this "requirement of venue states the public policy that fixes the situs of the trial in the vicinage of the crime * * *. A variation from that rule for convenience of the prosecution or the accused is not justified. The result would be delay and confusion."

5. Prosecution for tax evasion by concealing assets rests upon a dictum of this court in *Spies*. There this court (317 U. S. 492, at p. 499), after pointing out that Congress in § 145(b) had merely stated that a wilful attempt to defeat and evade might be committed "in any manner," and had not attempted to define the various methods by which the offense might be accomplished, observed:

> "'By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as * * * concealment of assets or covering up sources of income * * * and any conduct, the likely effect of which would be to mislead or to conceal."

We have not been able to discover a single authority in this, or in any other, federal court which undertakes to define the felony of evading the tax by concealment or which establishes the elements of that crime. The instant case proves the necessity for such a definition.

Question 7

The necessity for a definition of the elements of the offense of tax evasion by concealment or misappropriation

of assets is underscored by Livorsi's conviction on Count 9 of the indictment which alleges that he and others wilfully attempted to defeat and evade the payment of a large part of the taxes due and owing by American Brands Corporation for the calendar year 1946, "in that they did misappropriate, convert and divert assets of the aforementioned corporations (sic) to their own use and benefit" (15-16).

1. The tax period involved under this count was the year 1946. The return was due in 1947, during which year it was claimed that Livorsi "did misappropriate, convert and divert assets" of the corporation. Livorsi was not an officer of the various "American" corporations (1915). He was a stockholder of record of American Brands Corporation (1912) and had a proprietary interest in the others (1116) which were known as American Brands Wholesale Corporation, American Trucking & Forwarding Corporation, American Sweets Corporation and American Agar Corporation (12). In 1946, he received a salary from some of the corporations (1183) which he reported in his 1946 return (2346). In 1946, Livorsi drew and reported a total of $65,452.96 from the "American" corporations (Govt. App. 86a, Ex. 154).

2. To establish the so-called misappropriation, conversion and diversion of American Brands Corporation assets during 1947, Theodore Present, a government accountant, took the stand and testified from schedules which he had prepared from the books (1916) that certain moneys were withdrawn from "the various companies, American Brands companies" (1916) from January, 1947, to "the end of their books on November 20, 1947" (1916). In that period, he testified that Livorsi drew $57,058.33 (1917). Present then took this eleven-month period and broke it down into successively shorter periods all within the original January to November span. Thus, he stated that from March to November, 1947, Livorsi had drawings of $30,058.33

(1922). In a still shorter period, from June 16th through November, Livorsi's drawings were $500 (1922-3). Finally, from September 15th, when the corporate tax return was filed until the end of the period in question, Livorsi drew nothing (1923). Present admitted that part of these drawings were corporate salaries, but did not state what part were, or were not, in this category (1923). Withdrawals of cash to which he testified (1918-23) were in no way brought home to Livorsi.

3. There was no evidence at all that any of these withdrawals were for a fraudulent or improper purpose. There was not the slightest suggestion by anyone that Livorsi was not an employee of the corporations. There was no testimony that Livorsi knew anything about the financial condition or tax situation of any of the corporations. Indeed, the prosecutor maintained, in his summation, that the corporations were solvent until they were forced into an involuntary receivership in New Jersey in December of 1947, and that there "was plenty of money on December 2nd, plenty of assets on December 2nd" to pay all creditors, including the taxes due the government (2626). Although the prosecution contended that the receivership was "the most important single method of concealing" in the case (2627), no one claimed that Livorsi had anything to do with it or was in any way involved in it. Walter Kohn, the attorney for the corporations in the receivership, stated, "I never saw Livorsi" (2248). The prosecutor admitted that Livorsi had nothing whatever to do with "the business decisions" (2639). There was no evidence that Livorsi had anything to do with the tax liability of any of the corporations, with their tax returns, with their business operations, or that he had any knowledge of their losses.

4. The record thus establishes that Livorsi's drawings for 1947, the period in which he is alleged to have misap-

propriated, converted and diverted corporate assets, were slightly less than similar drawings for the year 1946. Yet the government, in prosecuting Giglio and Roth for attempting to defeat and evade the tax due by American Brands Corporation for the year 1946 (11; Count 3) did not challenge a single dollar of the money drawn by Livorsi from the corporations in 1946 (1919). Indeed, while Present was testifying concerning withdrawals from the "American" corporations in 1947, the crucial year, he added, "There were similar withdrawals in the year 1946, though. None of those were disallowed" (1919).

5. Without establishing any element of intent or wilfulness, without proving that the defendant had any knowledge of losses sustained by the corporations, despite an admission that the defendant had nothing to do with the business decisions and an admission that the corporations were solvent well after his drawings ceased, the government has convicted Livorsi of attempting to defeat and evade the tax of American Brands Corporation by misappropriating, converting and diverting its assets, merely by proof that he made withdrawals from the corporation in an amount almost identical with the amount withdrawn for the previous year, unchallenged by the government. There was nothing in the evidence against Livorsi to render fraudulent the 1947 withdrawals which were almost identical with those deemed proper for 1946.

CONCLUSION

It is respectfully submitted that the questions raised here are of such importance under the Constitution and in the administration of criminal law and, particularly, in the law relating to income tax evasions, that there should be an authoritative determination thereof by this court. Ac-

cordingly, petitioners ask that this court issue a writ of certiorari to review the judgment of affirmance herein.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit.

Before: CLARK, *Chief Judge*
MEDINA, *Circuit Judge* and
GALSTON, *District Judge*.

CLARK, *Chief Judge*:

Appellants Giglio, Livorsi, and Lawn appeal from judgments of conviction of violations of the Internal Revenue Laws and conspiracy entered after a lengthy trial to a jury. Appellants and one other defendant, Louis J. Roth, who pleaded guilty on all counts and who was a principal witness for the prosecution, were named as conspirators in one count of a ten-count indictment charging violations of 26 U. S. C. §§ 145(b) and 3793(b) and of 18 U. S. C. § 371. In addition, Giglio was named in seven, Livorsi in three, Lawn in two, and Roth in eight substantive counts. The jury found each of the three guilty as charged. A fifth defendant named in the conspiracy count, American Brands Corporation, was eliminated by dismissal of the indictment after the jury failed to report as to it. Judge Walsh sentenced Giglio and Livorsi to a total of fifteen years of imprisonment on the various counts on which they were convicted, while he gave Lawn a total of a year and a day.

The conspiracy here disclosed involved attempts by a variety of means to evade assessment and payment of federal income taxes on large amounts of income earned in the World War II black market in sugar. The individual and corporate taxes evaded for the calendar year 1946 alone amounted to more than $800,000. Generally three means of evasion of tax assessment were used: (1) the fraudulent allocation of income among the various companies and individuals in the conspiracy, (2) the fraudulent overstate-

ment of expenses, and (3) the failure to disclose income (a technique very infrequently resorted to by these defendants). Further, defendants attempted to defeat collection of taxes through the concealment of the individual assets of Giglio and Livorsi and the misappropriation, conversion, and diversion of corporate assets. The testimony adduced amply sustained the charge.

Giglio and Livorsi were the central figures in the conspiracy. It was they who profited so royally as equal partners in the fabulous proceeds of the wartime black market. And it was they who procured the services of Roth, an accountant, to assist them in protecting their ill-gotten gains from tax claims. Lawn, a lawyer, had been Chief of the Criminal Division of the United States Attorney's Office for the District of New Jersey before entering their employ. He participated in much of the planning of the conspiracy for evasion of taxes by Giglio-Livorsi enterprises. He held executive positions in some of the participating companies; and, although his beneficial stock interest was small, he, like Roth, received substantial compensation for his services.

It is neither necessary nor feasible to describe here all the details of the multifarious techniques of tax evasion employed in the furtherance of this conspiracy, but sufficient facts should be set forth to show the magnitude and ingenuity of the operation. In April, 1945, the Tavern Fruit Juice Company was organized as a partnership. Giglio and Livorsi, the two real partners, also listed their wives as partners, though the latter contributed no capital to the enterprise. The information return of Tavern partnership falsely listed the wives as partners, even though Giglio and Livorsi later picked up the wives' supposed distributive shares on their own personal tax returns.[1]

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[1]In this connection the witness Roth was asked the following question by the prosecutor: "Well, if you filed an individual return for Mr. Giglio and Mr. Livorsi, picking up those figures, why didn't you

About a month after Tavern was organized, a second partnership, Eatsum Food Products Co., Ltd., was launched. The true partnership interest at the time of formation in this enterprise was as follows: Giglio, 25%; Livorsi, 25%; and Lubben (a key government witness at the trial below), 50%. But a partnership information return for Eatsum was filed showing several dummy partners, including the wives of Giglio and Livorsi. The wives' income was in fact picked up on the husbands' individual returns. Nine months after its formation the Eastum partnership agreement was modified, Lubben agreeing to accept about $117,000 as his distributive share of the partnership profits in return for the right to start a separate business and Giglio agreeing to pay the taxes on Lubben's share.

Of the two partnerships, during the first nine months of operation Eatsum alone earned almost three quarters of a million dollars. In order further to reduce taxes the conspirators set up a series of corporations, each bearing in some combination the name "American." The purpose of the corporations was to drain off the profits of Eatsum through the use of fraudulent invoices. The corporations were then to be dissolved before taxes fell due, and no income would be reported. The important corporations themselves were financially successful. So, in order again fraudulently to minimize taxes, Giglio and Roth procured the filing in the name of American Brands Corporation of a consolidated return covering the associated corporations, even though they knew that the parent-subsidiary relationship required by statute did not exist.

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change the partnership information return so that it wouldn't indicate that the wives were partners?" His reply was: "The reason I didn't file—the reason I picked up the income of the wives on the individual husbands' tax return, these taxes, the tax liability, the tax that was due, there was no money to pay, and it was never intended at that time to pay it: and in order to avoid the women having trouble with the Tax Department, we picked up the wives' income on the husbands' tax returns, so that all the trouble would accrue to the husbands."

As thus indicated, appellants rarely resorted to an actual failure to report income. Roth's testimony, however, disclosed one illuminating instance in which such a failure apparently did take place. Part of the Eatsum operation involved the purchase and sale of corn and corn syrup, with black market price overages being paid and received in cash passing through a cash box kept in the Eatsum office. Over $400,000 in cash passed through the cash box in the course of the corn syrup operations, resulting in a profit to Eatsum of about $140,000. Apart from an item of $50,000 of "Other Income" entered on both Livorsi's and Giglio's return, the cash box profit was not reported.

Another device used for the evasion of tax assessment consisted of fraudulent deductions for fictitious expenses and purchases. Along similar lines $63,091.52 in Tavern closing inventory was not reported, thereby fraudulently reducing the reported income of Tavern and shifting the inventory to American Brands, where it would not be reported until a corporation return was filed at a later date.

In addition to their efforts to defeat the imposition of full tax liability, appellants sought in a number of ways to delay, hinder, and prevent the collection of those taxes for which they admitted liability. They accomplished this result by filing late returns, by failure to withhold taxes as required by law, by filing false estimated personal tax returns, by filing false tentative corporate returns, by filing returns in the wrong district, by filing false returns for certain third persons in order to obviate the necessity of disclosing certain "cash box" receipts by Eatsum, and possibly also by filing an inaccurate carry-back loss claim and by the erroneous reporting by Giglio and Livorsi of $50,000 of "other income." Upon the filing of all tax returns here relevant on September 15, 1947, the conspirators made an extensive effort to convert leviable assets to cash. A particulary colorful incident in this process was the sale of the Livorsi

estate in New Jersey. Livorsi received a check for $64,335.49 in payment for his equity in this property, which he subsequently cashed at the Merchants Trust Company in Red Bank, New Jersey. He left the bank with the entire amount in currency stuffed in his trousers' pockets.

Similarly, four days before the filing of tax returns, with the assistance of Lawn, Giglio transferred his New Jersey estate to Roth, even though Giglio continued to live in it. Four days after tax returns were filed a $15,000 interest in the Van Dyck Industrial Corporation held in Giglio's name was sold, the proceeds going to Roth's special bank account and thence into the American Brands Corporation; it was never used to satisfy the tax liability of the corporation. Again in September, 1947, there was a sale of the Manhattan offices of the various enterprises for $10,000; but Roth had no knowledge of this money's being used to pay taxes. Before and after the filing of returns the conspirators withdrew large amounts of cash from the various "American" corporations, charging off these withdrawals to selling or other expense. The corporations went into state receivership in New Jersey in late 1947, and loans in comparatively large amounts owed by various of the conspirators to the corporations were concealed through falsification of the books. Further, as a result of the receivership, corporate assets were sold at a sacrifice and the proceeds were not applied to discharge the federal income tax liability. One of the most substantial physical assets was the equipment in a plant in New Jersey. Years after the disposal of this asset in receivership, Giglio continued to operate at the plant. There was evidence of concealment and destruction of records, threats to potential witnesses,[2] improper influence and bribery,

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[2] David G. Lubben, at one time a partner of Giglio and Livorsi, testified on direct examination as follows:

"Q. You also said in this conversation that you had previously been told to keep you mouth shut. When was that?

receivership and bankruptcy proceedings tinged with fraud, and subornation of perjury.

The *admitted* tax liability for the year 1946 of Giglio, Livorsi, and American Brands Corporation according to their filed returns was $573,683.73. The total tax paid was $16,735.95. This astronomic discrepancy (which is exclusive of falsification of the returns themselves), when viewed in connection with the activities outlined above, demonstrates why there was no reasonable doubt of the guilt of these conspirators. This is quite obviously true as to Giglio, the active manager of the enterprises, and as to Livorsi, his equal partner, who, although not so active as Giglio in the routine operation of the businesses, nonetheless knew of and approved the major conspiratorial acts. So Livorsi, who in direct furtherance of the conspiracy demanded and carried away from the Red Bank, New Jersey, bank over $64,000 in cash received for his New Jersey estate, was clearly anything but ignorant of the fraudulent character of other activities from which he thus handsomely profited.

As for Lawn, although he did not partake of the fruits of the conspiracy on the scale of Giglio and Livorsi, there

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A. I was told by Mr. Giglio to stay away from 253 [Broadway (the New York headquarters of special Treasury agents)] and to keep my mouth shut, that everything would work out all right. I was also told by Mr. Roth if I ever opened my mouth I would find myself at the bottom of the Hudson River in a cement box."

Bernard Bercu, a certified public accountant, testified on direct examination:

"'Mr. Giglio was in my private office, explaining to me—perhaps I will put it directly: Mr. Giglio said to me that these work papers were being destroyed because of his—because, as he said, he wanted to know that his partnership affairs were kept within his control and that no outsider knew anything about them.

"He then said to me, 'We have ways of taking care'—and this is in substance, because this happened ten years ago, or nine years ago—in substance he said, we have ways of taking care of any man who talks about our affairs out of turn."

is ample evidence to establish his guilt as charged. A significant part of his value to the conspiracy was his alleged familiarity with certain government officials and his purported ability thereby to ward off prosecution. He was the legal adviser to Giglio and Livorsi, and he participated in the planning and execution of a number of the schemes for tax evasion. For a person of his admitted legal astuteness to deny knowledge of the fraudulent transactions which proliferated around him is wholly amazing. He seems to have been particularly active in the formation of the "American" corporations, the concealment of Giglio's assets, and the arrangement of the New Jersey receivership; but of course his culpability is by no means limited to these phases of the developing scheme. He served as an officer or a director of several of the enterprises involved, and he received ample compensation for his services rendered in furtherance of the conspiracy.

Against this background so conclusively establishing the guilt of these appellants, numerous assignments of error are for the most part entirely insubstantial and in no event present difficulty. Primarily appellants allege an invasion of their constitutional rights through the use of evidence obtained in violation of their privilege against self-incrimination. An indictment found in 1952 against these same defendants had been dismissed by Judge Goddard, who held that defendants' testimony and production of partnership records before a grand jury constituted a violation of their privileges against self-incrimination because at the time of the grand jury hearings these defendants were also defendants in pending criminal informations and were not advised on the record of their rights. *United States* v. *Lawn*, D. C. S. D. N. Y., 115 F. Supp. 674.[3] In 1953

[3]The government's appeal was dismissed as not timely filed. *United States* v. *Roth*, 2 Cir., 208 F. 2d 467; but, as the two opinions in *United States* v. *Scully*, 2 Cir., 225 F. 2d 113, show, the legal problem is still open before us.

the indictment in the present case, similar to, but not identical with, the 1952 indictment, was found. Defendants moved to dismiss the 1953 indictment on grounds that it was tainted with the same alleged illegally obtained evidence; to suppress evidence, leads, and clues derived from the tainted source; to direct a hearing to ascertain the scope of the suppression order; to direct that the minutes of the grand jury proceedings leading to the 1953 indictment be made available to defendants; and to direct return of the books and papers covered by Judge Goddard's order. Except for a direction of return of these books and papers, Judge Palmieri denied the motion in a reasoned opinion. *United States* v. *Giglio,* D. C. S. D. N. Y., 16 F. R. D. 268. At the trial, Judge Walsh, relying on Judge Palmieri's opinion and the reasoning incorporated therein, denied similar motions.

It was a proper exercise of discretion for the judges to rely upon the detailed affidavits of government attorneys and investigators setting forth the sources of evidence used in obtaining the 1953 indictment and demonstrating that it was not based upon the alleged illegally obtained material. The mere fact that Judge Goddard dismissed the 1952 indictment because of the use of allegedly illegal evidence did not create a requirement as a matter of law for cross-examination of government witnesses and examination of government documents and grand jury minutes; and particularly is this so in the face of the strong adverse showing made by the affidavits of the prosecution. See *Nardone* v. *United States,* 308 U. S. 338; *Goldstein* v. *United States,* 316 U. S. 114, affirming *United States* v. *Goldstein,* 2 Cir., 120 F. 2d 485; *Lapides* v. *United States,* 2 Cir., 215 F. 2d 253; *United States* v. *Flynn,* D. C. S. D. N. Y., 103 F. Supp. 925. Under the circumstances here presented, the decision not to accord a full dress hearing upon oral testimony, together with disclosure of the grand jury minutes, was within the sound discretion of the court. See *Carrado*

v. *United States*, D. C. Cir., 210 F. 2d 712, certiorari denied 347 U. S. 1018; *United States* v. *Foster*, D. C. S. D. N. Y., 80 F. Supp. 479.

Moreover, this is a case of great complexity developed during years of investigation. Sufficient evidence had been adduced even by 1950 for the case to become the subject of several days' testimony before the Kefauver Committee, and criminal informations were filed shortly thereafter; investigation and development of evidence continued after that time. If it be conceded that some additional evidence tainted with unconstitutionality may have entered into the finding of the 1952 indictment, it does not follow that the 1953 indictment was not based exclusively upon the massive evidence not so tainted. In the face of the government's detailed affidavits, appellants have clearly failed to sustain their burden of proving the contrary.

As to the further contention that the so-called "tainted" evidence may have been used at the trial itself (in contrast to its use in procuring the indictment), it is clear that appellants had a right of full cross-examination during the trial as to the sources of government exhibits and that they exercised this right on a number of occasions. On defendants' motion to dismiss at the conclusion of the government's case, Judge Walsh found nothing in the record of trial suggesting any use of illegal clues. We see no basis for contravening this finding.

Lawn makes strident objection to the introduction of government Exhibit 61A-B—a photostatic copy of a check payable to Lawn and the check-stub page corresponding thereto, bearing grand jury markings and allegedly elicited before the 1952 grand jury in violation of Lawn's constitutional privilege. But before introduction at the trial this evidence was the subject of preliminary questioning by Lawn's able and experienced trial counsel (now deceased) who finally interposed "no objection" to its admission. Fur-

ther, on this appeal the government offers to prove that other copies of the same documents were in its possession months before the 1952 proceedings and that these "untainted" copies could have been easily substituted at trial if the discrepancy had been pointed out by objection of defense counsel. Lawn therefore suffered no harm whatsoever and has obviously waived his objection.

Appellants further object to various consequences of Judge Walsh's action in cautiously removing from the consideration of the jury the question of the "distributive shares" from the Eatsum partnership. In this regard the contention of the government was in essence that the distributive share of the Giglio-Livorsi group had been increased from its original 50 per cent by reason of Lubben's agreement of March, 1946, to accept $117,000 in lieu of his original share, and that, therefore, the 1946 personal returns of Giglio and Livorsi correspondingly understated their income. Appellants on the other hand argued that Lubben was charged with the full 50 per cent fixed by the original partnership agreement, and that the taxable share of the Giglio-Livorsi group could not therefore exceed 50 per cent. In order to avoid this confusing problem in tax law, the judge instructed the jury to disregard alleged understatement of income from Eatsum in considering the counts charging the falsification of individual returns. Since, however, there was evidence of understatement of income from sources other than Eatsum, the verdict on these counts must stand. The charge was not misleading.

In cross-examination of a government witness friendly to appellants, defense counsel elicited testimony that "Mr. Giglio was well regarded in the [Long Branch] area." Defense counsel had been previously informed by the court that his question went beyond the scope of the direct examination. On redirect examination the prosecutor asked the witness whether or not his opinion of Giglio's reputa-

tion would have been affected by knowledge of Giglio's arrest in Detroit. Judge Walsh sustained an objection to the question and instructed the jury to disregard it, although he stated that he would rule the other way if the prosecutor insisted. Since defense counsel deliberately opened the door to this line of questioning, since the prosecutor's question was in apparent good faith, and since in any event the jury was instructed to disregard the question, there was no error. See *Myres* v. *United States*, 8 Cir., 174 F. 2d 329, certiorari denied 338 U. S. 849.

There is no occasion to discuss the numerous other assignments of error—none of which showed merit. We are constrained to say that the presentation of this appeal was marred by a virulent attack, particularly on behalf of appellant Lawn, upon the integrity and the ethics of the prosecutor. An examination of the record shows that this was utterly unwarranted. On the contrary, he and his associates conducted the prosecution with devotion, responsibility, and rare skill against experienced and determined defense. We do not think that even the exigencies of the defendants' case justified or excused this attack. The trial was fair and the result proper, if not inevitable.

Affirmed.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of April, one thousand nine hundred and fifty-six.

PRESENT:

HON. CHARLES E. CLARK,
Chief Judge

HON. HAROLD R. MEDINA,
Circuit Judge

HON. CLARENCE G. GALSTON,
District Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM GIGLIO, FRANK LIVORSI and HOWARD LAWN,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and hereby is affirmed.

A. DANIEL FUSARO
Clerk.

Judgment of District Court as to William Giglio

On this 11th day of March, 1955 came the attorney for the government and the defendant appeared in person and by counsel,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a Jury of the offense of unlawfully aid and assist in preparation of false income tax returns; evasion of income taxes due the U. S. by filing false income tax returns; wilfully and knowingly attempt to defeat and evade payment of a large part of taxes due and owing by him and by American Brands Corporation, in that he did conceal assets of himself and did misappropriate, convert and divert assets of American Brands Corporation to his own use and benefit. conspiracy to violate T26 Sec 145b USC, T26 Sec. 3793 (b) (1) USC. T26 Sec 145b USC. T26, Sec 145b and T18 Sec. 2 USC as charged in counts 1-2-3-4-5-7-9-10 and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE YEARS on count ten

FIVE YEARS on count one to run consecutively to and begin after sentence on count 10.

FIVE YEARS on each of counts 2-5-7 to run concurrently with each other and concurrently with sentence on count one.

FIVE YEARS on count three to run consecutively to and begin after sentence on count one.

FIVE YEARS on counts 4 and 9 to run concurrently with each other and concurrently with sentence on count three.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

LAWRENCE E. WALSH,
United States District Judge.

Judgment of District Court as to Frank Livorsi

On this 11th day of March, 1955 came the attorney for the government and the defendant appeared in person and by counsel,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of evasion of income taxes due the U. S. by filing false income tax returns; wilfully and knowingly attempt to defeat and evade the payment of a large part of taxes due and owing by him and American Brands Corporation, in that he did conceal assets of himself and did misappropriate, convert and divert assets of American Brands Corporation to his own use and benefit; conspiracy to violate T. 26, Sec. 145b USC. (T. 26, Sec. 145b USC. T. 26, Sec. 145b and T. 18, Sec. 2 USC. T. 18, Sec. 371 USC) as charged in counts 6-8-9-10 and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE YEARS on count ten.

FIVE YEARS on count six to run consecutively to and begin after sentence on count ten.

FIVE YEARS on count eight to run concurrently with sentence on count six.

FIVE YEARS on count nine to run consecutively to and begin after sentence on count six.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

LAWRENCE E. WALSH,
United States District Judge.